VIRGINIA
LAW REVIEW

VOL. VIII. JUNE, 1922 No. 8

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN VIRGINIA.*

5. PROCEDURE.

(a) *Scope of the Appellate Jurisdiction.*

Both Constitution and statutes gave such broad powers to the Court and such wide limits in the exercise of these powers that the question of the jurisdiction of the Court has seldom been raised.

Section 3454 of the Code of 1904 excepted (for the purposes of appeal) "the action of the said commission in ascertaining the value of any property or franchise of a railroad or canal company". In the first of the "Rolling Stock Cases" [120] (previously discussed) the Court quickly disposed of the appellee's objection to the appeal by pointing out that the case involved no appeal from any appraisement of value by the Commission, since the controversy (to which the railway company was not a party) was between the City (Newport News) and the County (Elizabeth City) as to which was "entitled to the benefits of the taxes to flow from the assessment made by the Commission".[121]

Jones v. *Rhea* [122] is the leading case on this subject. Here

*Continued from the May issue, page 506.

[120] Board of Supervisors of Elizabeth City County *v.* City of Newport News, 106 Va. 764.

[121] 106 Va. l. c. 767. The Court, in the same connection, also pointed out that there was nothing in Code 1904, § 573 (a) [which covers the correction of erroneous assessments in cases not otherwise provided for] that would preclude the appeal.

[122] (Va.), 107 S. E. 814 (1921).

the late Judge Saunders considers the entire question in an elaborate opinion. The key-note of the Court's attitude is struck in this sentence: "The architects of the present Constitution of this State evinced *a very liberal attitude* (italics mine) towards appeals from orders of the Corporation Commission".[123] Accordingly, after an order had been entered by the Commission permitting the merger of two non-stock club corporations, the Court permitted an appeal by a group of minority members of one of the clubs though these members were not parties to the proceedings before the Commission.[124] In like spirit the Court swept aside both the suggestion that there could be no appeal from a mere ministerial order of the Commission and the objection (which was more important) that the order of the Commission was not a final order.[125] Indeed the whole opinion is a refreshing example of an altogether too rare tendency of an appellate court to construe procedural statutes with a view to finding in them the means to encompass the manifest purpose for the accomplishment of which the statutes had obviously been enacted.

(b) *Method of Taking Cases to the Court.*

After providing for the liberal appeal discussed by Judge Saunders in the preceding case, the Constitution (in the same section) [126] further provided "that the writs of mandamus and prohibition shall lie from the the Supreme Court of Appeals to the Commission in all cases where such writs, respectively, would lie to any inferior tribunal or officer". Yet a diligent search of

[123] 107 S. E. l. c. 819.

[124] The amended Statute gave an appeal "at the instance of the applicant or of any *party in interest*" (italics mine). A note appended by the Code revisors indicated that the use of the italicised words had broadened the scope of the previous statute. 107 S. E. l. c. 819.

[125] The Court evidently thought that under the broad language of § 3833 "any order or decision of the State Corporation Commission" (omitting the word final), there could be an appeal from an interlocutory order, though it was remarked: "Moreover the order rejecting the application of the petitioners to intervene in the pending proceedings, and excluding them entirely from participation therein, was certainly, as to them, a final order." 107 S. E. l. c. 822. The Court cited Jeffries *v.* Commonwealth, 121 Va. 425 as authority for the doctrine that there might be an appeal from a mere ministerial action of the Commission.

[126] Va. Const. (1902), § 156 (a).

the reports has brought forth not a single case of prohibition and only two cases in which mandamus has been employed. All other cases seem to have gone up to the Court by simple appeal.

In *Jones* v. *Rhea* (just discussed), the Commission, having held that the minority members of one of the clubs were not parties to the controversy, emphatically but consistently held that they were "not entitled to such transcript of the record for appeal";[127] but the Court (with equal consistency and even greater emphasis) held that the parties were entitled to an appeal, that as a necessary concomitant thereof they were entitled to a copy of the record in the merger proceedings before the Commission, that mandamus was the proper remedy to secure this record, and "to that end the chairman of the Commission alone is the necessary party (defendant) to the petition for mandamus".[128] *Jones* v. *Rhea,* then, may be said to have gone to the Court by mandamus-appeal.

To Col. Joseph Button seems to belong the unique distinction of having (apart from an appeal) secured the review (and to his great joy the reversal) of an order of the Commission by the much simpler and far swifter[129] application to the Court (as an original proceeding) for mandamus to the Commission.[130]

(c) *Weight to Be Given by the Court to the Decisions of the Commission.*

(i) *In General.*

In a constitutional provision on this subject one would rather look for technical terms or at least for legal phraseology. Yet we read: "the action of the Commission appealed from shall be regarded as *prima facie* just, reasonable and correct".[131] Was "just" used with a spiritual or at least a moral flavor? Does "reasonable" connote practicality together with flexibility of standards under widely varying conditions? Is "correct" a more or less colorless and negative word implying mere freedom

[127] 107 S. E. 1. c. 816.

[128] 107 S. E. 1. c. 818.

[129] A peremptory writ was awarded at a special term of the Court convened at the instance of the Governor.

[130] Button *v.* State Corporation Commission, 105 Va. 634.

[131] Va. Const. (1902), § 156 (f).

from error in the light of conventional and acknowledged tests? The Court has never analyzed the provision in question along these lines nor has the Court seen fit, as is now the prevailing legal fashion,[132] to make clean cut distinctions between questions of law and questions of fact; although this has often been implied in the course of the decisions as well as in the Court's general method of approaching the problem. For, quite without saying so, the Court has been much readier and more willing to review questions of law than questions of fact; while in the field of so called "discretion"; a general tendency to abide by the Commission's decision is obviously discernible. Perhaps in this particular field the Court misdoubted the possibility of hard and fast classification into these (often elusive but frequently useful) analytical categories.

(ii) *Cases Affirmed.*

The first case decided [133] might have afforded the Court an opportunity *in limine* to indicate its view of that provision. In the opinion, however, in a case of very real importance (involving a simple clean-cut question of law), the Court (after setting out at some length the facts presented by the transcript of the record), contented itself (in a *per curiam* opinion citing no case, statute or constitution whatever) with a bold statement (utterly unsupported by any discussion) that the legal situs of the vessels in question is in Virginia, and that the finding of the Commission is accordingly without error.

In the second case [134] (just one week later), also involving a

[132] Proctor *v.* S. S. Serbino, [1915] 3 K. B. 344; Stock *v.* Central Midwives Board, [1915] 3 K. B. 756; Inland Revenue Commissioners *v.* Sanson, [1921] 2 K. B. 492; United States *v.* Ju Toy, 198 U. S. 253; Kwock Jan Fat *v.* White, 253 U. S. 454; Interstate Commerce Commission *v.* Louisville, etc., Ry. Co., 277 U. S. 88; Ohio Valley Water Co. *v.* Ben Avon Borough, 253 U. S. 287. See also articles in 30 Yale Law Journal 781 (Isaacs); 35 Harvard Law Rev. 127 (Albertsworth). See, too, article 32 Columbia Law Rev. 1 (Isaacs) referring to "the delusive simplicity of the distinction".

[133] Old Dominion Steamship Co. *v.* Commonwealth, 102 Va. 576. This case was later (with both discussion and citation of authorities) affirmed by the U. S. Supreme Court, 198 U. S. 299.

[134] Atlantic Coast Line Ry. Co. *v.* Commonwealth, 102 Va. 599. Here also the decision of the Commission was affirmed.

question of law, the constitutional provision in question was quoted among various excerpts from the Virginia Constitution; but beyond this it was not discussed or even mentioned in the opinion. No notice whatever was taken of this provision in the third case before the Court.[135]

But in the fourth case,[136] the Court did squarely invoke the provision and held "there is nothing whatever in the record that overcomes, in the slightest degree, the presumption arising upon the findings of the Corporation Commission that the crossing of the tracks of one electric railway company by the tracks of another authorized are necessary and proper".[137] Accordingly, on these seeming questions of fact, the necessity and propriety of the crossings, the Court (with no discussion of the evidence on these questions) sustained the Commission with the further remark that the evidence and the report of the expert engineer showed "that the Commission in this matter has been untiring, most careful and painstaking".[138]

A rate case [139] (the first one before the Court) furnishes the next appearance of the constitutional principle of *prima facie* validity. The preceding case is cited; the constitutional provision is quoted; the commissioners are presumed to be expert ratemakers whose findings are entitled to peculiar weight; but "aside from these considerations, the evidence fully sustains the judgment of the Commission in that regard" [140] (correctness of the rate).

Again, in a case involving merely a question of law,[141] the Court entertains no doubt of the correctness of the Commission's decision (though two out of five members of the Court dissented); but said the majority opinion: "If we entertained doubt merely, our hesitation would have to be solved in favor of the State, as the Constitution requires us to regard the action of

[135] American Surety Co. *v.* Commonwealth, 102 Va. 841. Again the Court upheld the Commission.

[136] Newport News, etc., Ry. Co. *v.* Hampton Roads, etc., Ry. Co., 102 Va. 847.

[137] 102 Va. l. c. 850.

[138] 102 Va. l. c. 851.

[139] Norfolk, etc., Belt Line Ry. Co. *v.* Commonwealth, 103 Va. 289.

[140] 103 Va. l. c. 297.

[141] Standard Oil Co. *v.* Commonwealth, 104 Va. 683.

the Corporation Commission as *prima facie* correct".[142]

Quite similar is the statement: "the finding of the Commission is *prima facie* correct, and all presumptions are, therefore, in favor of its action, and the burden is on the appellant to show that the wide discretion [143] with which that tribunal is invested, has been erroneously exercised. We are of opinion that, without invoking the foregoing rule, there is ample evidence to justify the action of the Commission".[144]

To the same effect (in a seeming question of law in a railroad rate case) are *Washington Southern Ry. Co.* v. *Commonwealth,*[145] and *Norfolk and Western Ry. Co.* v. *Interstate Ry. Co.,*[146] but in this last case the Court is more articulate than it has yet been on the exact force of the constitutional clause: "The finding of the Commission cannot, however, be disturbed in the case before us, unless the evidence clearly shows that the finding was unwarranted." [147]

In the next case expressly quoting and applying the *prima facie* validity clause,[148] the Court reviews at some length the conflicting evidence as to the comparative desirability of two sites for a railroad station. Though the Court does not so expressly state, it seems fair to infer that the Court again affirmatively approved the choice of the Commission, though the Court seemingly leaned heavily on the Constitutional clause: "Certainly it cannot be said that the conclusion reached lacks support in the evidence, or that upon the evidence it is clearly wrong (Constitutional Clause quoted). Particularly should weight be attached to the findings of the Commission in a case in which, in addition

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[142] 104 Va. l. c. 688.

[143] This seems to be the first time this term is employed.

[144] Louisville & Nashville Ry. Co. *v.* Interstate Ry. Co., 107 Va. 225, 227-8.

[145] 112 Va. 515. Here, after quoting the Constitutional provision, and citing three cases decided by the U. S. Supreme Court, the Court says "The appellant has failed to sustain the burden cast upon it by the foregoing rule of decision and . . . the order of the Commission is just, reasonable and correct." 112 Va. l. c. 521.

[146] 114 Va. 789. "We are unable to see how the Corporation Commission could, with due regard to the rights of all parties, including the public, have reached a more just, reasonable and correct conclusion." 114 Va. l. c. 795.

[147] 114 Va. l. c. 795.

[148] Southern Ry. *v.* Commonwealth, 128 Va. 176.

to taking, weighing and passing in conflicting testimony, that tribunal visits the locality concerned in the effort to reach an appropriate finding on the merits." [149]

These cases seem to justify the statement that in each instance the Court reviewed the record in the light of, yet in a certain sense apart from, the decision reached by the Commission; but there is evidently a manifest disposition to find as the Commission found, to lean upon the Commission in case of lingering doubt, particularly when there is dissent by one or more members of the Court. And such dissent more frequently proceeds from questions of law, though the Court has rather studiously avoided the use of that category.

In no single case has the Court frankly taken this position: a different conclusion might well have been reached on the facts, but since there is evidence from which the conclusion of the Commission might reasonably have been reached, the Court will not go further into this question; or (to put it a bit more strongly): though the Court migh have held differently, the question before the Court is simply and solely whether there is sufficient evidence to support the conclusion of the Commission.[150]

These observations, then, lead to the frank question whether the actual result reached in every case by the Court would not have been the same, had there been no constitutional mandate of *prima facie* justice, reasonableness and correctness.

(iii) *Cases Reversed.*

Out of the first forty-two cases brought to the Court, fourteen have been reversed. A rather careful reading of the opinions in these fourteen cases seems to justify the statement that

[149] 128 Va. l. c. 200-201.

[150] Probably the last case discussed, Southern Railway Co. *v.* Commonwealth, 128 Va. 176, is the closest approach to this. See also *dictum* (since the case was reversed) of Sims, J., in Appalachian Power Co. *v.* Commonwealth (*ex rel.* National Carbide Corporation) [decided January 19, 1922]: "If there were a certificate in the record of facts found by the Commission, that, under the provisions of the Constitution on the subject, would evidence *prima facie* what such facts are; and the holding of such *prima facie* case to be conclusive as to all facts not appearing to the contrary from the record as presented on the appeal, would be a result of which the appellant could not complain."

in only three cases [151] [two not yet reported] has there been even a reference to this constitutional provision. The Court, in these reversal cases, seems to deal not with questions of whether the decision of the Commission found support in the evidence but with questions of the correctness (from the viewpoint of the Court) of the finding under review. A very brief chronological review of these fourteen cases would seem to be in order.

Wheelwright v. *Commonwealth* [152] may be passed by. Here the Commission denied the charter merely as the best method of bringing the case up on appeal. The Commission clearly indicated its opinion that the charter in question should be granted and the Court so held.

The Great Falls [153] case involved the condemnation by one public service corporation of the property of another such corporation under a Virginia Statute. Here the Court considered the question (apparently one of law) in true *de novo* fashion with no quotation from, and scant reference to, the Commission's finding apart from the observation that the Commission "erred . . . and therefore its action must be reversed".[154]

This same observation holds true of *Chesapeake & Ohio Ry. Co.* v. *Commonwealth,*[155] involving chiefly questions of law in determining whether the railroad company had lived up to its

[151] Southern Ry. Co. *v.* Commonwealth, 124 Va. 36; Appalachian Power Co. *v.* Commonwealth (*ex rel.* National Carbide Corporation) [decided January 19, 1922], Petersburg Gas Co. *v.* City of Petersburg, [decided February 2, 1922]. In the *first* of these cases, there was (as we shall see) a virtual affirmance; the Commission was specifically affirmed as to the two points on which the provision was cited, while it seems clear that the same result would have been reached in each instance apart from the provision. (See post, notes 170, 172.)

In the *two last cases* mentioned, the Court held the provision inapplicable since the record was so incomplete that the Court felt it could neither form an adequate opinion as to the findings of the Commission nor find even sufficient basis for the presumption of validity. [These two cases are discussed at the end of this sub-section.]

[152] 103 Va. 512. In the Commission opinion, it was said: "It rather seems to us that the intention of the Statute was not to forbid the chartering of a road such as that now asked for." 103 Va. l. c. 515.

[153] Great Falls Power Co. *v.* Great Falls, etc., Ry. Co., 104 Va. 416.

[154] 104 Va. l. c. 423.

[155] 105 Va. 297. The effect of the statute destroying the dam seems to have been the chief question.

definite obligation to provide facilities the same as, or at least equal to, those afforded by the Canal Company; and is even more strikingly illustrated in Button's original application for mandamus, when the only question was the strictly legal one of the constitutionality (as to the state Constitution) of an act of the Legislature.[156]

Winchester & Strasburg Ry. Co. v. *Commonwealth,*[157] presents the first reversal case in which the opinion of the Court contains any extended reference to the decision of the Commission, whose rulings (questions of law) on the exclusion of evidence, the sufficiency of the petition and the plea of *res adjudicata* were sustained. Further the Commission's order was quoted and sustained as to the main contention (that the appellants are bound to run their trains into Strasburg) but reversed on two grounds: (1) That the Commission specified one method by which this was to be worked out, whereas there were two legal methods open to the railroads which were entitled to choose between these, and (2) The order affected the rights of the Southern Railway which was not a party to the proceeding and had not been served with process.

In *Board of Supervisors of Elizabeth City County* v. *Newport News,*[158] the Commission was sustained on the jurisdictional question but reversed (on a question of law) in its decision that the rolling-stock of electric railways could be apportioned between city and county for taxation. Here the Court did discuss the ruling of the Commission, even going so far as to say that much might be said in favor of that ruling but that the considerations moving the Commission must be addressed to the Legislature, not to the Commission or Court.[159]

Perhaps the most important case reversed by the Court is *Southern Ry.* v. *Commonwealth.*[160] As in the earlier cases scant heed was paid to the Commission finding beyond the remark that

[156] Button *v.* State Corporation Commission, 105 Va. 634.

[157] 106 Va. 264.

[158] 106 Va. 764.

[159] We have already seen that the Legislature did pass an act providing for such apportionment. Commonwealth *v.* Chesapeake & Ohio Ry. Co., 118 Va. 261.

[160] 107 Va. 771.

the Commission found "difficulty, as its order states, in arriving at a satisfactory conclusion".[161] In holding the ruling void as an unreasonable interference with interstate commerce, the Court naturally devoted the lion's share of its opinion to analyzing and interpreting cases decided by the United States Supreme Court.

In remanding a case on the score that a necessary party to the proceeding had been omitted and not served with process, the Court naturally did not go into the merits of the case or discuss the Commission finding.[162]

Probably a more elaborate review of the evidence is found in *Danville and Western Ry. Co.* v. *Lybrook*[163] than in any other case reversed by the Court. Perhaps a strong dissent from the opinion of his two associates by the Chairman of the Commission may partly account for this. Several shippers here petitioned the Commission to order the removal of several buildings on the property of the railroad. The Court apparently leaned heavily on the dissenting opinion to overrule the Commission's finding of fact that the building did seriously interfere with the railroad in the performance of its duties as a common carrier. This case seems to be the closest approach made by the Court to overruling the Commission on a finding of fact.[164]

With the dissenting opinion of a commissioner before it, the Court, in *Jeffries* v. *Commonwealth*,[165] again felt called upon to comment on the opinions of the Commission. These opinions (there were three of these, one by each commissioner) were all

[161] 107 Va. 1. c. 774.

[162] Baltimore & Ohio Ry. Co. *v.* Commonwealth, 110 Va. 215.

[163] 111 Va. 623.

[164] The case before the Commission may be found in Annual Report of State Corporation Commission (Virginia), (1909), pp. 6-9. The dissenting opinion of Prentis, Chairman, seems more specific and convincing than the majority opinion. There were questions of law in this case involving the right of a shipper to complain on the score that the carrier had wrongly exercised the power of eminent domain, the distinction between the private and public functions of a carrier, and the right of the carrier to permit private parties to occupy its premises for the receipt and delivery of freight so long as free and safe passage is left for the carriage of freight and passengers. This last right is expressly upheld in Grand Trunk Ry. *v.* Richardson, 91 U. S. 454; Missouri, etc., Ry. Co. *v.* Nebraska, 164 U. S. 403; Hartford, etc., Ins. Co. *v.* Missouri, etc., Ry. Co., 175 U. S. 91.

[165] 121 Va. 425.

analyzed and the points raised in each were discussed in the opinion of the Court,[166] which granted to public service corporations the right of voluntary dissolution.

Southern Ry. Co. v. *Commonwealth*[167] (as has been observed)[168] was virtually an affirmance.[169] The Commission approved a 45° underpass, but this involved an order for the re-location of a public road which the Commission felt was beyond its jurisdiction. Accordingly the Court ordered the 45° underpass conditioned on the consent of the Board of Supervisors of Albemarle County. In several places in the opinion the Court quotes both the order and opinion of the Commission and discusses the case in the light of both. Two uses are made of the Constitutional provision: (1) "Not only is its [the Commission's] finding to be regarded as *prima facie* correct, but it is supported by the decided weight of the evidence."[170] (2) The railway attacked the power of the Commission on the ground that the exercise of this power might "require the expenditure of millions of dollars by the railroads of this State".[171] Very aptly the Court observed that it will not presume that the Commission will "render an unjust or unfair decision"; but rather will the Court "follow the mandate of the Constitution 'that the action of the Commission appealed from shall be regarded as *prima facie* just, reasonable and correct' ".[172]

[166] See 121 Va. l. c. 434, 435, 436, 440, 446, 448, 449, 451-2. In this case the Court reviews the opinions of the Commission at greater length than in any other of the cases reversed by the Court. The Court appends an opinion of the Attorney General in support of its views and further quotes a letter written by the Chairman of the Commission (121 Va. l. c. 446) in which he at one time conceded the right which in his opinion in the instant case he afterwards denied.

[167] 124 Va. 36.

[168] See foot-note 151.

[169] "Costs will be awarded to the appellee as the party substantially prevailing." 124 Va. l. c. 64.

[170] 124 Va. l. c. 59. See *ante* foot-note 151. So the Court here affirmed the Commission on this particular point, which it doubtless would have done even without the constitutional provision.

[171] 124 Va. l. c. 53.

[172] 124 Va. l. c. 53. See further, on the salutary doctrine that the exercise of administrative power cannot be held invalid merely on the ground of possible misuse of the power, the language of Holmes, J., in Dalton Adding Machine Co. *v.* State Corporation Commission, 236 U. S. 699,

Jones v. Rhea [173] involved only questions of law, substantive and procedural. On the main questions, the Commission was reversed with a recital of the order appealed from and one brief extract from the Commission's opinion.[174]

In the two most recent cases decided by the Court (on appeal from the Commission) [175] an important qualification of the doctrine of *prima facie* validity is clearly laid down. In each of these cases (involving the regulation of rates for public utilities) the Court held that when the certificate of facts [required by the Virginia Constitution, § 156 (f)] is so faulty that the Court can form no adequate opinion as to the Commission's conclusions and the facts on which these are based, then there is no occasion even for a presumption of validity and the case must be remanded. Reference was more than once made to this by Judge Sims in the Appalachian Power Company case; [176] while, in the Petersburg

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701: "It is not for the Courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly." [This case involved an unsuccessful attempt to enjoin the Virginia Corporation Commission in the U. S. District Court]. See also, to the same effect the remarks of the same judge in St. Louis, etc., Ry. Co. *v.* Middlekamp, 41 Sup. Ct. Rep. 489, when he refused to presume that the statute would be enforced in such a way as to deny the equal protection of the laws. In the instant case, the Virginia Court would have doubtless (even apart from the constitutional provision) made the same presumption.

[173] (Va.), 107 S. E. 814.

[174] 107 S. E. l. c. 822, 824. This extract stated merely that the Commission at first doubted the statutory authority for the merger but that later "we have reached the conclusion that this authority is manifestly conferred". The Court also stated barely that the question of the authority to merge "was taken up, considered at length and passed on by the Commission as appears from its opinion." 107 S. E. l. c. 822. The opinion of the Court in this case is probably the longest opinion ever filed by the Court on an appeal from the Commission.

[175] Appalachian Power Co. *v.* Commonwealth, (*ex rel.* National Carbide Corporation) [decided Jan. 19, 1922]; Petersburg Gas Co. *v.* City of Petersburg [decided Feb. 2, 1922].

[176] See note 175. "As the Constitution gives to the action of the Commission appealed from, the *prima facie* presumption of correctness, it is plain that it intends that the Commission shall certify both the facts found and shall also state the conclusions reached, upon which the action appealed from is based, separately from the evidence certified, otherwise it would be impossible for the appellate court to know to what facts or conclusions to give such presumption."

Gas Case,[177] Judge Burks tersely observed: "It is impossible to tell from the record how the Commission arrived at its valuation. In the absence of the facts required by the Constitution to be stated, we cannot presume *prima facie* that the findings of the Commission are correct". The logic of this is rather obvious, for under any other rule the Commission (if it felt so inclined) could insure an affirmance by deliberately making the certificate of facts incomplete and inadequate. It is altogether to the credit of the Commission that its certificates, in the first forty cases taken to the Court, were so admirable that in none of these cases does the question seem to have been even seriously raised.

(iv) *Summary.*

Professor Isaacs[178] gives this exact analysis:

"In cases of true review, the point of rehearing may conceivably be either:

(a) to reconsider conclusions
  (x) of law
  (y) of fact, or
  (z) of policy . . . or
(b) to try the trial, i. e., to pass upon
  (x) the good faith involving at times the question whether there is any evidence worth considering;
  (y) the regularity or adequacy of procedure. . .
  (z) the jurisdiction of the administrative body as determined:
    (A) by the law (constitutions and statutes)
    (B) by the jurisdictional facts; or

[177] See note 175.

[178] 30 Yale Law Journal 781, 785. (*Judicial Review of Administrative Findings.*) The difference as to "the point of rehearing" is very clearly brought out in the celebrated Ben Avon Case. The Pennsylvania Superior Court [Pub. Utility Rep. 1918A, p. 161, 68 Pa. Superior Court Rep. 561] gave scant heed to the Commission's findings and undertook anew an independent investigation of its. own. The Pennsylvania Supreme Court limited its inquiry as to whether there was sufficient evidence from which the Commission might reasonably have reached its finding with the insistence that if there was, then no court should substitute its own finding on the facts for the finding of the Commission. 260 Penn. 289, 103 Atl. 744.

(c) to reach a conclusion when the administrative has failed to do so, or has reached an erroneous conconclusion".

According to this analysis, it would seem that the Virginia Court has quite often come under (a)(x) and (a) (y) [with a favorable pre-disposition toward the Commission's finding], but without clearly attempting to distinguish (a)(x) from (a)(y), and extremely seldom has had to deal with (a) (z); that the Court has not (as it well might have) limited itself to (b)(x) [by virtue of the Constitutional provision]; that (b)(y) has (and this is all to the credit of the Commission) seldom given the Court grave concern; that (as we shall see later) (b)(z) is to a certain extent before the Court in every case [the Constitutional provision more than counterbalancing the presumption against the jurisdiction of a special tribunal] with (b)(z)(A) giving very little trouble and (b)(z)(B) of very great importance, the Commission being rather inclined to push its jurisdiction too far; that the Court has felt least inclined to give weight to the provision of *prima facie* validity under (c) in connection with erroneous conclusions, for the Commission never seems to have been backward about coming forward with some conclusion.

(d) *Adoption by the Court of the Opinion of the Commission.*

Neither in England (in the Court of Appeal or House of Lords), nor in our federal system (Circuit Court of Appeal or United States Supreme Court), nor in our highest State Courts has the practice of adopting (on affirmance) the opinion of a lower tribunal (either an administrative body or a court of first instance or an intermediate appellate court) gained wide currency. All the more unique, then, is this practice, which does obtain in the Virginia Supreme Court of Appeals, of adopting opinions of the Virginia Corporation Commission. In more than one-third of such affirmances, the Court has adopted (practically in its entirety) the opinion handed down (or here more properly up) by the Commission.[179] Seven out of ten of these cases contained

[179] The first case in which this was done was the eighth case to come before the Court. It has not, however, been employed in any of the last

little or no other discussion besides the Commission [180] opinion. The Court, in two cases,[181] discussed the case at slight length (besides quoting the Commission opinion), while in one case,[182] the Court discussed the case in extended detail.

Parts of Commission opinions have been adopted in at least two cases of affirmance; [183] while in at least two cases reversed by the Court, parts of dissenting opinions filed by the Commissioners have been adopted.[184]

In adopting a Commission opinion, the gentle and kindly custom obtains of paying the Commission at least a graceful compliment.[185]

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nine cases before the Court. The ten cases in which the Court has adopted the opinion of the Commission, in chronological order, are:

1. Virginia Passenger, etc., Co. *v.* Commonwealth, 103 Va. 644;
2. Commonwealth *v.* Atlantic Coast Line Ry. Co., 106 Va. 61;
3. Robert Portner Brewing Co. *v.* Southern Express Co., 109 Va. 22;
4. Commonwealth *v.* Norfolk & Western Ry. Co., 111 Va. 59;
5. Clayville Mfg. Co. *v.* Southern Ry. Co., 114 Va. 356;
6. Norfolk & Western Ry. Co. *v.* Interstate Ry. Co., 114 Va. 789;
7. Commonwealth *v.* Chesapeake & Ohio Ry. Co., 118 Va. 261;
8. General Railway Signal Co. *v.* Commonwealth, 118 Va. 301;
9. Dalton Adding Machine Co. *v.* Commonwealth, 118 Va. 563;
10. Washington & Old Dominion Ry. Co. *v.* Commonwealth, 122 Va. 397.

[180] Numbers 1, 3, 4, 5, 6, 7, 8 in Note 179.

[181] Numbers 9, 10 in Note 179.

[182] Commonwealth *v.* Atlantic Coast Line Ry. Co., 106 Va. 61.

[183] Washington, etc., Ry. Co. *v.* Commonwealth, 112 Va. 515; Commonwealth *v.* Richmond, etc., Ry. Co., 115 Va. 756.

[184] Danville, etc., Ry. Co. *v.* Lybrook, 111 Va. 623; Jeffries *v.* Commonwealth, 121 Va. 425.

[185] "We have given the views of the Corporation Commission in full because they are so clear and convincing that we are content to adopt them as the opinion of this Court." Va. Passenger, etc., Co. *v.* Commonwealth, 103 Va. 644, 649. "The reasons given in its opinion are in accord with our views and are satisfactorily expressed." Robert Portner Brewing Co. *v.* Southern Express Co., 109 Va. 22, 26. "The opinion of the Chairman of the Corporation Commission . . . so fully and so satisfactorily disposes of all the questions involved that we cannot do better than to adopt it as the opinion of this Court, with slight verbal changes." Commonwealth *v.* Norfolk & Western Ry. Co., 111 Va. 59, 61. "Judge Robert R. Prentis, Chairman of the Commission, in an exhaustive opinion, has discussed all questions raised by the petitions for appeals with convincing ability." Commonwealth *v.* Chesapeake & Ohio Ry. Co., 118 Va. 261, 264. Other examples might be quoted.

(e) *Procedure before the Corporation Commission.*

A sane and progressive spirit seems to have influenced the Court in its attitude towards reversals for more or less technical procedural error on the part of the Commission. Substantial rights of litigants have been adequately safeguarded by the Court but little sympathy has been shown with the outworn doctrine that presumes prejudice from any error however slight. Indeed the happiest aspect of the problem of procedure lies in the fact that questions in that field have so seldom been pressed upon the Court.

Wheelwright v. *Commonwealth* [186] (in which, in order to settle the controversy more effectively, the Commission invited and obtained a reversal), and *Jones* v. *Rhea* [187] (in which the Commission denied a transcript of the record to persons, who, in its opinion were not parties to the litigation and had no right to appeal) have previously been discussed.

Only one case [188] seems to have been reversed *solely* on a question of procedure, involved in the decision of the Commission.[189] There the Court held that when a necessary party to the proceeding has had neither notice nor the opportunity to be heard, the Court (without passing on any of the questions involved) will reverse the fine imposed and remand the case to the Commission for further proceedings. There was a similar holding (though there were other grounds for reversal) in *Winchester, etc., Co.* v. *Commonwealth.*[190] But as to the sufficiency of a mere statutory notice, the Court in another case declared: "There is no merit in this contention, as no injury resulted to the appellant from the action complained of." [191]

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[186] 103 Va. 512.

[187] (Va.), 107 S. E. 814.

[188] Baltimore & Ohio Ry. Co. *v.* Commonwealth, 110 Va. 215. This involved the due process of law clause of the U. S. Constitution, though the Court did not refer to it.

[189] But see Appalachian Power Co. *v.* Commonwealth (decided Jan. 19, 1922); and Petersburg Gas Co. *v.* City of Petersburg (decided Feb. 2, 1922) for reversals on the ground that the record sent up to the Court was faulty and incomplete.

[190] 106 Va. 264.

[191] Norfolk & Western Ry. Co. *v.* Tidewater Ry. Co., 105 Va. 129, 133.

And in this last case, it was held that though the Commission acted as a Court of record and thus could not receive unsworn testimony, yet there would be no reversal, since, if the unsworn testimony were excluded, there still remained ample sworn evidence that would support the Commission's finding. Quite in line with this was a decision that "the letter of Commissioner Rhea was plainly a request upon the Company to discontinue operations;" [192] the statement "The appellant is in no wise hurt, as it may at any time hereafter go before the Commission and make complaint";[193] the observation that, since a rule imposing an unreasonable burden on interstate commerce is void in any form, the procedure under the rule is altogether immaterial;[194] and sustaining the Commission in passing on the sufficiency of the petition, in excluding evidence on immaterial issues and in over-ruling a plea of *res adjudicata.*[195]

Judge Keith's concurring opinion, in this last case, is interesting, particularly his closing sentence: "The Commission may exercise legislative and judicial functions, but cannot confuse and blend them in one procedure, but when considering the adoption of a regulation is in the exercise of one department or head of its authority, and when passing upon the violation of such regulation is exercising a wholly separate function, and is to be controlled by wholly different considerations in order to meet the requirements of due process of law, and to adjudicate rights in accordance with the law of the land." [196]

Until very recently, complaint about the records sent up by the Commission had been refreshingly conspicuous by its absence. Manifestly the Court was (it would seem) trying the case not the record. But in the Appalachian Power Case,[197] the Court felt compelled to send back the case owing to the glaring

[192] Southern Ry. Co. *v.* Commonwealth, 128 Va. 176, 201.

[193] City of Clifton Forge *v.* Va.-Western Power Co., 129 Va. 377, 387, 107 S. E. 400, 403.

[194] Southern Ry. Co. *v.* Commonwealth, 107 Va. 771.

[195] Winchester, etc., Ry. Co. *v.* Commonwealth, 106 Va. 264, 274, 278.

[196] 106 Va. 264, 281. Holmes, J., in Prentis *v.* Atlantic Coast Line Ry. Co., 211 U. S. 210, 226 refers to "the learned President in his pointed remarks in Winchester, etc., Ry. Co. *v.* Commonwealth".

[197] Appalachian Power Co. *v.* Commonwealth, (*ex rel.* National Carbide Corporation) [Decided Jan. 19, 1922].

inadequacy of the record sent up to it by the Commission. "In the absence of any finding of facts by the Commission", said Sims, J., "or any opinion of the Commission or statement of the reasons upon which its action appealed from was based, touching the questions involved in the case, we cannot with proper efficiency undertake to consider and determine 'the reasonableness and justness of the action of the Commission' ". Another interesting procedural point was involved in this case. The Commission in fixing the rates for electric power followed the report of the Commission's engineer; but "neither complainant nor respondent were given any opportunity to consider or object to such report or its conclusions before it was considered by the Commission". This action, in the opinion of Sims, J., "deprived the Power Company of due process of law".[198]

From the standpoint of rate-regulation, the Petersburg Gas Case [199] has already been discussed, but here again, in one of the most difficult cases ever before the Commission, the Court, in sending back the case, rather severely criticised the record. In fixing the value of the property of public utilities as a base for rate-making purposes, a Commission should state in great detail the precise scheme it employed, and the exact facts it found, in arriving at this valuation.[200] Yet, in the instant case, we are

[198] This decision is very interesting in connection with the celebrated Arlidge Case, [1915] A. C. 120. There the British House of Lords (overruling the Court of Appeal) upheld the decision though Arlidge was expressly denied the opportunity of seeing the report of the inspector which must have influenced the decision. There is in England, of course, no 14th Amendment, but the Court of Appeal held that the conduct of the Local Government Board was opposed to the principles of natural justice. The Arlidge case brought forth an elaborate opinion in the Court of Kings Bench [1913] 1 K. B. 463; even more detailed discussion is found in the opinions filed by the Court of Appeal (Hamilton, J., dissenting) [1914] 1 K. B. 160. While this question was discussed at very great length in the separate opinions filed in the House of Lords. But Judge Sims (in the Virginia case) reached the opposite result (after stating the facts and the brief assignments of error by the appellant) in three sentences (two containing less than 20 words each) without the citation or discussion of a single case. His opinion in this case (covering 11 typewritten pages, legal cap size) is noteworthy as failing to cite a single case.

[199] Petersburg Gas Co. *v.* City of Petersburg (decided Feb. 2, 1922).

[200] See State, etc., Commission *v.* Springfield, etc., Co., 291 Ill. 209.

told "The opinion (of the Commission) does not show how this valuation was arrived at . . . it failed to show what portion of the real estate was not so used, or useful, or the value thereof. It also fails to state what rate of return it allowed upon the valuations fixed by it, or the rate of annual depreciation, or the fair cost of operation. . . The opinion does not show and we are unable to ascertain from it the reasons which justified the Commission in fixing $1.75 as a fair rate to be charged per thousand cubic feet."

(6) Jurisdiction of the Commission.

(a) *Validity of the Commission.*

Necessarily involved in the jurisdiction of the Commission, is the question of its validity. Naturally, in affirming the first decision of the Commission, the Court impliedly recognized the lawful existence of the Commission, yet no mention or suggestion of that question is found in the opinion.[201] The opening sentence of the opinion in the second case reads: "By section 155 of the Constitution, which went into effect July 10, 1902, a permanent Commission is created to be known as the 'State Corporation Commission' ".[202] Not a line on the subject is found in the third [203] and fourth case.[204] The fifth case [205] tells us merely that this constitutionally created Commission "is the instrumentality through which the State exercises its governmental powers for the regulation and control of public service corporations. For that purpose it has been clothed with *legislative, judicial* and *executive* powers" [italics mine].

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[201] Old Dominion Steamship Co. *v.* Commonwealth, 102 Va. 576.

[202] Atlantic Coast Line Ry. Co. *v.* Commonwealth, 102 Va. 599, 600. But the opinion goes no further in this connection than to quote various provisions of the Virginia Constitution and to enumerate some of the duties of the Commission. This case was cited and approved in Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 227.

[203] American Surety Co. *v.* Commonwealth, 102 Va. 841.

[204] Newport News, etc., Ry. Co. *u.* Hampton Roads, etc., Ry. Co., 102 Va. 847.

[205] Norfolk, etc., Ry. Co. *v.* Commonwealth, 103 Va. 289, 294. No suggestion of invalidity, however, is made by virtue of this union of powers. This case is cited with approval in Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 224.

It was not until the fifteenth case [206] before the Court that a serious attack was made on the Commission as "illegitimate and invalid tribunal" combining legislative, executive and judicial functions "in contravention of section 5 of the Virginia Bill of Rights, which provides 'That the legislative executive and judicial departments of the state should be separate and distinct' " [207]. Very properly and vigorously the Court decided against this contention and the life of the Commission has never since been subject to serious judicial question.[208]

In this connection *Prentis* v. *Atlantic Coast Line Co.*[209] (probably the most widely quoted case involving the Virginia Corporation Commission) [210] is worthy of note. The Commission, after it had determined certain railway passenger rates, was enjoined by the railroads (in the U. S. Circuit Court) from publishing and enforcing these rates which were alleged to be confiscatory. The majority opinion (by Holmes, J.,) and the separate opinions of Fuller, C. J., and Harlan all contain extended

[206] Winchester, etc., Ry. Co. *v.* Commonwealth, 106 Va. 264. The Constitution creating the Commission had then been in force over four years. This case was cited with approval by the United States Supreme Court in Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 225, 226. It was cited with approval and discussed in Henrico County *v.* City of Richmond, 106 Va. 282, 293.

[207] 106 Va. l. c. 267. Of course the ubiquitous 14th amendment of the United States Constitution was also pressed into service.

[208] The continued persistence of the antiquated doctrine (traced back through Montesquieu to Aristotle) that governmental powers *must* be exercised in three water-tight compartments is as striking as it is unfortunate. In this country Marshall C. J., early (1825) scotched this doctrine in Wayman *v.* Southard, 10 Wheat. 1, but it has proved a juristic Banquo's ghost and continually reappears. A few of the many modern important cases involving the doctrine are: Field *v.* Clark, 143 U. S. 649; Buttfield *v.* Stranahan, 192 U. S. 470; Union Bridge Co. *v.* U. S., 204 U. S. 364; Intermountain Rate Cases, 234 U. S. 476; Mutual Film Corporation *v.* Ohio, 236 U. S. 230.

[209] 211 U. S. 210. An important case, limiting the scope of the Prentis Case and showing by comparison the very broad powers of the Virginia Supreme Court on appeals from the Corporation Commission, is Bacon *v.* Rutland Railroad Co., 232 U. S. 137.

[210] In ROSE'S NOTES (53 Lawyer's Edition), 7 pages are given to cases citing and applying this case. In Chicago, etc., Ry. Co. *v.* Cole, 251 U. S. 54, 56, the Prentis case is cited as authority for the doctrine that a State "may confer legislative and judicial powers upon a commission not known to the common law".

discussions of the nature of the Commission, though, in reversing the injunction decree, the case seems to have gone off chiefly on the ground of comity. An appeal as a matter of right lay to the Virginia Supreme Court (vested with the fullest powers as to the order appealed from) and the United States Supreme Court held that the federal courts should not interfere until the railroads had taken the case to the State Supreme Court. Assuming the validity of the Commission as a union of legislative and judicial functions, Holmes, J., in discussing the applicability of a federal statute[211] forbidding federal courts from enjoining proceedings in State Courts, insisted that this provision looks to the character of the proceedings, not the character of the body, sought to be enjoined. Rate-making here, he held, was legislative, so the statute did not apply. Fuller, C. J., declared: "Not only do the Constitution and laws of Virginia make the Commission a judicial Court of record by clothing it with all the attributes of such a tribunal, but they expressly declare it a Court";[212] while Harlan, J., went beyond Fuller, C. J., by insisting that, under the federal statute in question, "the (U. S.) Circuit Court was entirely without authority, by injunction, to stay the proceedings of the State Corporation Commission".[213]

(b) *Jurisdiction of the Commission.*

Jurisdictional questions, in the case of an administrative tribunal of strictly limited powers derived from a State Constitution and State Statutes, are, to a certain extent, involved in every case presented to such a tribunal and by the same token are bound up in every appeal from a decision of that tribunal to an appellate court. Such questions, then, have, of course, been

[211] U. S. Rev. St. § 720; U. S. Comp. Stat. 1901, p. 581. Prof. Hardman (30 Yale Law Journal 681) takes issue here with the views expressed in the opinion of Holmes, J.

[212] 211 U. S. 210, l. c. 233. The Commission has not hesitated to declare Virginia Statutes unconstitutional: Button *v.* State Corporation Commission, 105 Va. 634; Commonwealth *v.* Atlantic Coast Line Ry. Co., 106 Va. 61; and it declared a statute invalid as repugnant to a later statute: Board of Supervisors, etc. *v.* Commonwealth, 116 Va. 311.

[213] 211 U. S. l. c. 238.

treated in the foregoing discussion, for they cannot be rigidly isolated apart from the actual content of the decisions. So this sub-section will be partly a résumé of what has been said, partly a few general observations upon questions directly concerned with the Commission's jurisdiction on which the Court has seen fit to pass judgment.

Questions of jurisdiction and questions of procedure often run together. Thus, as we have seen,[214] though both the parties and the subject matter may be proper, in judicial proceedings, when a party has had neither notice nor an opportunity to be heard, there can be (by virtue of the due process clause) no decision binding on that party handed down by the tribunal. But when a rule of the Commission imposes (in the instant case) an unreasonable burden on interstate commerce, since this cannot be done in any way, the procedure is immaterial.[215]

Again a distinction may be made between jurisdiction[216] to pass (*in limine*) on the controversy and the power to enter a particular order or grant the relief desired. No cases seem to have arisen in which the Court reversed the Commission either for an improper failure to take jurisdiction and pass on the controversy or for improperly taking jurisdiction of a controversy which it had no jurisdiction to decide. But in several cases,[217] the Court has reversed the Commission for properly taking jurisdiction of the controversy and then granting relief which it had no power to grant. Thus (in the first case cited),[218] the Commission had jurisdiction to entertain the condemnation proceeding but, since

[214] Baltimore & Ohio Ry. Co. *v.* Commonwealth, 110 Va. 215. See also Winchester, etc., Ry. Co. *v.* Commonwealth, 106 Va. 264.

[215] Southern Ry. Co. *v.* Commonwealth, 107 Va. 771.

[216] A very widely accepted definition of jurisdiction is that given by Brown, J., in The Resolute, 168 U. S. 437: "Jurisdiction is the power to adjudicate a case upon the merits and dispose of it as justice may require." Questions of venue, apart from jurisdiction, in connection with the Commission have never plagued the Court.

[217] Great Falls Power Co. *v.* Great Falls, etc., Ry. Co., 104 Va. 416; Chesapeake & Ohio Ry. Co. *v.* Commonwealth, 105 Va. 297; Board of Supervisors, etc. *v.* City of Newport News, 106 Va. 764; Danville, etc., Ry. Co. *v.* Lybrook, 111 Va. 623; Jeffries *v.* Commonwealth, 121 Va. 425; Jones *v.* Rhea (Va.), 107 S. E. 814.

[218] Great Falls Power Co. *v.* Great Falls, etc., Ry. Co., 104 Va. 416.

there was (so the Court held) neither a public necessity nor an essential public convenience, the Commission could not enter an order giving the right of condemnation. And (in the last case cited) [219] the Commission had the jurisdiction to pass on the petition for the merger but, since (so held the Court) the right of club corporations to merge was not given by the Virginia Constitution and Statutes, the Commission could not enter a valid order permitting the Commonwealth and Westmoreland clubs to merge. In *Newport News, etc., Water Co.* v. *Peninsular, etc., Water Co.*,[220] the Commission properly took jurisdiction of the case to decide whether the injury complained of (interference by one water company with the pipes of another water company) affected primarily private property rights or public duties; and then the Commission properly held (the Court decided) that the injury was primarily private so that the injunction sought could not be granted.

If we may believe the Court, it seems a fair inference that the attitude of the Commission in jurisdictional questions has been that of a willing performer rather than a modest violet. Certainly the Commission has deemed its field a broad one and, when in doubt, it seems to have assumed jurisdiction. Six cases have just been cited [221] which the Court felt called on to reverse because in each case the Commission *exceeded* its powers. Four other cases were reversed for similar reasons.[222] Finally, in this connection may be added the two most recent cases appealed to

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[219] Jones *v.* Rhea (Va.), 107 S. E. 814.

[220] 107 Va. 695.

[221] See ante note 217. In one of these cases, Board of Supervisors, etc. *v.* Newport News, the Court held that the Commission had invaded the province of the legislature.

[222] Button *v.* State Corporation Commission, 105 Va. 634 (the Commission claimed the power to appoint its subordinate officers); Winchester, etc., Ry. Co. *v.* Commonwealth, 106 Va. 264 (the Commission undertook not merely to order what should be done but to prescribe the method by which it should be done); Southern Ry. Co. *v.* Commonwealth, 107 Va. 771 (the Commission undertook to impose unreasonable restrictions on interstate commerce); Baltimore & Ohio Ry. Co. *v.* Commonwealth, 110 Va. 215 (the Commission entered an order without giving notice and an opportunity to be heard to a necessary party).

the Court from the Commission.[223] Both were reversed primarily because the Commission's record was an insufficient basis on which the Court might form a proper estimate of the reasonableness of the rates fixed by the Commission; yet, in each case, from the information before it, the Court intimated that the Commission had been over-bold rather than too timid in its decision. In the twenty-eight cases affirmed by the Court, naturally there was no material error committed by the Commission in determining its jurisdiction.

On the opposite side of the ledger are *Wheelwright* v. *Commonwealth,*[224] when the Commission expressed the propriety of granting the relief desired by the petitioner though it denied the relief so that the responsibility might be assumed by the Court; and *Southern Ry. Co.* v. *Commonwealth*[225] where the Commission manifested a somewhat similar unwilling attitude as to annexing a condition to, and then promulgating in that form, what it considered the proper order to give adequate relief.

(7) Miscellaneous.

Under this head come three cases to which reference has been made under the heads of Procedure and Jurisdiction but which have not been treated from the standpoint of substantive law

The first case[226] involved, besides its legal phases, a somewhat picturesque incident in Virginia political history. Section 155 of the Virginia Constitution provided in one sentence "The Commission . . . shall have one clerk, one bailiff and such other clerks, officers, assistants and subordinates as may be provided by law, all of whom shall be appointed, and subject to removal, by the Commission"; while two sentences further on in the same section was a further provision "The General Assembly may establish within the department, and subject to the supervision and control of the Commission, subordinate divi-

[223] These cases (not yet reported) are Appalachian Power Co. *v.* Commonwealth (*ex rel.* of the National Carbide Corporation), [decided January 19, 1922, opinion by Sims, J.]; Petersburg Gas Co. *v.* City of Petersburg, [decided February 2, 1922, opinion by Burks, J.].

[224] 103 Va. 512.

[225] 124 Va. 36.

[226] Button *v.* State Corporation Commission, 105 Va. 634.

sions, or bureaus of insurance. . ." The Legislature (under the Act of March 9, 1906) elected Col. Joseph Button to the office of Commissioner of Insurance, whereupon the Commission alleged that this Act contravened the above-mentioned constitutional provision under which the Commission claimed the right to appoint the Commissioner and refused to permit Colonel Button to qualify by taking the oath and executing the bond required by law. Col. Button, objecting to inclusion in the category of "such other clerks, officers, assistants and subordinates" (and incidentally wishing to assume the high office to which he had been elected) promptly sought (and obtained) a peremptory writ of mandamus ordering the Commission to permit him to qualify. This action the Court justified by pointing out: (1) Every reasonable doubt must be resolved in favor of the Constitutionality of a statute; (2) A State Constitution is a limitation upon, not a grant of, the powers of a State legislature, and (3) The rule (to exclude the Colonel from the objectionable category) of construction known as *ejusdem generis.*

The second case [227] arose in the "old, *unhappy,* far-off" days (adjectives Wordsworth's, italics mine) before the 18th Amendment was passed, when Volstead was not a name to conjure with in Virginia. But even then an honest brewer had (to revert again to Wordsworth) his "battles long ago". For the unsympathetic Commission held under the Virginia "Byrd Law" that a brewer (the Court euphemistically called him a manufacturer of malt liquors) had no right (even if his "manufactory" be situated in "licensed" territory) "to sell his product,[228] to be delivered to a common carrier to be transported to a place where it cannot legally be sold" [229]

Thirdly (and lastly) came *Jones* v. *Rhea.*[230] Here the single question on the merits was the validity (under the Virginia Statutes) of the merger of two non-stock club corporations.[231] The

[227] Robert Portner Brewing Co. *v.* Southern Express Co., 109 Va. 22.

[228] Chiefly beer.

[229] 109 Va. l. c. 23.

[230] (Va.), 107 S. E. 814.

[231] This case involved the merger of the two most important clubs (the Westmoreland Club and the Commonwealth Club) of the City of Richmond. All the judges of the Virginia Supreme Court were members of

Commission approved the merger, emphasizing in its opinion the broad scope of the general merger statute.[232] This was reversed by the Court in an elaborate opinion which insisted that every reasonable intendment was against the power to merge, that the use of the word "business" in the merger statute excluded a social club, and that the whole tenor of all the statutes applicable to corporate merger indicated rather clearly that business corporations (not clubs) were present in the mind of the Legislature. Judge Saunders ably and thoroughly discussed both statutes and decisions; he made no serious effort to analyze the reasons back of the Statutes nor did he attempt to evaluate the comparative excellence of the results reached by the one or the other of the two suggested interpretations.[233] Thus, the *delectus personarum,* playing no part in the ordinary business corporation yet the very soul of a club, might be suggested as having influence with a legislator in failing to authorize the merger of clubs while he freely granted that right to corporations organized solely for business gain. After all is said and done, it is quite probable that the case belongs to those characterized by Professor Gray: "when what the judges have to do is not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present".[234] If such a point had been present in the mind of the

the Westmoreland Club, so the convening of a special court (which the Virginia Statutes permit) to hear the case was at one time gravely suggested. The case occasioned in Richmond lengthy (and often acrid) debates, while legal opinion was quite evenly divided. These considerations doubtless were partly responsible for the length and elaborateness of the opinion of Judge Saunders. The decision of the Court, however, was unanimous.

[232] The Commission Opinion (by Rhea, Chairman) will be found in 1920 Virginia Corporation Commission Reports, pp. 260-263. That opinion did not discuss the effect to be given to the use of the word "business" in the statute, that seemed to the Court to be controlling in the controversy.

[233] "Thus Savigny's three aids to interpretation are *First*: the consideration of the law as a whole; *Second*: the consideration of the reasons of the statutes; *Third*: the excellence of the result reached by a particular interpretation." GRAY, THE NATURE AND SOURCES OF THE LAW, (2d ed.) p. 178. Judge Saunders confined himself to the first of these.

[234] GRAY, THE NATURE AND SOURCES OF THE LAW, (2d ed.) p. 173.

Legislature, nothing could have been simpler (or more sensible) than to provide briefly and clearly (in specific terms) either for or against the merger of non-stock corporations.

(8) STATISTICS.

(a) *Total Number of Cases*: 42.[235]

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[235] These cases, chronologically listed, are:

Cases Appealed from the Virginia Corporation Commission to the Virginia Supreme Court of Appeals.

1. Old Dominion Steamship Co. *v.* Commonwealth, 102 Va. 576 (1904); affirmed 198 U. S. 299.
2. Atlantic Coast Line Railway Co. *v.* Commonwealth, 102 Va. 599 (1904).
3. American Surety Co. *v.* Commonwealth, 102 Va. 841 (1904).
4. Newport News and Old Point Railway Co. *v.* Hampton Roads Railway Co., 102 Va. 847 (1904).
5. Norfolk and Portsmouth Belt Line Railway Co. *v.* Commonwealth, 103 Va. 289 (1904).
6. Lake Drummond Water and Canal Co. *v.* Commonwealth, 103 Va. 337 (1904).
7. Wheelwright (and others) *v.* Commonwealth, 103 Va. 512 (1905).
8. Virginia Passenger and Power Co. *v.* Commonwealth, 103 Va. 644 (1905).
9. Great Falls and Old Dominion Railway Co. *v.* Great Falls Power Co., 104 Va. 416.
10. Standard Oil Co. *v.* Commonwealth, 104 Va. 683 (1905).
11. Norfolk and Western Railway Co. *v.* Tidewater Railway Co., 105 Va. 129 (1906).
12. Chesapeake and Ohio Railway Co. *v.* Commonwealth, 105 Va. 297 (1906).
13. Button *v.* State Corporation Commission, 105 Va. 634 (1906).
14. Commonwealth *v.* Atlantic Coast Line Railway Co., 106 Va. 61 (1906).
15. Winchester and Strasburg Railway Co. *v.* Commonwealth, 106 Va. 264 (1906).
16. Board of Supervisors of Elizabeth City County *v.* City of Newport News, 106 Va. 764 (1907).
17. Louisville and Nashville Railway Co. *v.* Interstate Railway Co., 107 Va. 225 (1907).
18. Newport News Light and Water Co. *v.* Peninsular Pure Water Co., 107 Va. 695 (1908).
19. Southern Railway Co. *v.* Commonwealth, 107 Va. 771 (1908).
20. Robert Portner Brewing Co. *v.* Southern Express Co., 109 Va. 22 (1908).

(b) *Cases Affirmed and Cases Reversed.* Affirmed: 28; Reversed: 14.[236]

21. Baltimore and Ohio Railroad Co. *v.* Commonwealth, 110 Va. 215 (1909).

22. Commonwealth (*ex rel.* Norton Board of Trade) *v.* Norfolk and Western Railway Co., 111 Va. 59 (1910).

23. Danville and Western Railway Co. *v.* Lybrook (and others), 111 Va. 623 (1911).

24. Washington Southern Railway Co. *v.* Commonwealth, 112 Va. 515 (1911).

25. Clayville Manufacturing Co. *v.* Southern Railway Co., 114 Va. 356 (1913).

26. Norfolk and Western Railway Co. *v.* Interstate Railroad Co., 114 Va. 789 (1913).

27. Commonwealth (*ex rel.* Dowden) *v.* Richmond and Rappahannock Railway Co., 115 Va. 756 (1914).

28. Board of Supervisors of Henrico County *v.* Commonwealth (*ex rel.* City of Petersburg and others), 116 Va. 311 (1914).

29. Commonwealth (*ex rel.* City of Richmond) *v.* Chesapeake and Ohio Railroad Co. (and others), 118 Va. 261 (1916).

30. General Railway Signal Co. *v.* Commonwealth, 118 Va. 301 (1916); affirmed 246 U. S. 500.

31. Dalton Adding Machine Co. *v.* Commonwealth, 118 Va. 563 (1916); affirmed 246 U. S. 498. [The U. S. Supreme Court had denied an injunction in this case, 236 U. S. 699.]

32. Jeffries (and others) *v.* Commonwealth, 121 Va. 425 (1917).

33. Washington and Old Dominion Railway Co. *v.* Royster Guano Co., 122 Va. 397 (1918).

34. Elliott's Knob Iron Steel and Coal Co. *v.* State Corporation Commission, 123 Va. 63 (1918).

35. Southern Railway Co. *v.* Commonwealth, 124 Va. 36 (1918).

36. Virginia Western Power Co. *v.* City of Clifton Forge (and others), 125 Va. 469 (1919).

37. City of Richmond *v.* Chesapeake and Potomac Telephone Company of Virginia, 127 Va. 612 (1920).

38. Southern Railway Co. *v.* Commonwealth, 128 Va. 176 (1920).

39. City of Clifton Forge *v.* Virginia-Western Power Co., 129 Va. 377, 106 S. E. 400 (1921).

40. Jones *v.* Rhea (Va.), 107 S. E. 814 (1921).

41. Appalachian Power Co. *v.* Commonwealth (*ex rel.* National Carbide Corporation) [decided January 19, 1922].

42. Petersburg Gas Co. *v.* City of Petersburg, [decided February 2, 1922].

An earnest effort has been put forth to make this list complete to March 1, 1922. A diligent search of the reports was made, while the list has been checked by both an official of the Supreme Court of Appeals and an official of the Corporation Commission. Copies of the opinions in the last two cases (as yet unreported) were obtained from the files of the Supreme Court of Appeals.

[236] Of these (as has been indicated), one case, (Wheelwright *v.* Com-

(c) *Chief Party in Interest.*

The cases (on this score) may be thus classified:

Railroads: 20; Street Railways: 6; Private Business Corporations: 6; Electric Power Companies: 3; Water Companies: 2; and Gas Companies, Steamship Companies, Telephone Companies, Social Clubs, and State Office Holders: 1 each.

(d) *Subject Matter in Controversy.*

Regulating the General Activities of Railroads and Street Railways: 19; Licensing and Taxation of Corporations: 9; Rates of Public Service Corporations: 8; Regulating the General Activities of Private Business Corporations: 2; Procedure before the Commission, Merger of Club Corporations, Regulating the General Activities of Public Service Corporations, and Title to Public Office: 1 each.

(e) *Method of Taking the Case to the Court.*

Appeal: 40; Mandamus: 1, Mandamus-Appeal: 1.

(9) Conclusions.

1. Nearly two decades of experience would seem to have justified the foresight of the constitution makers in giving both extensive jurisdiction and broad powers to the Commission. Legislative enactments subsequent to the Constitution have been quite generally in the line of increasing the Commission's power.

2. The centralizing of general administrative authority in a single commission (rather than scattering this authority among separate and more or less unrelated bodies) has made for both economy of effort and co-ordinated efficiency.

3. Without the manifestation of any anti-corporation feeling, the Commission has been ready and willing in protecting the interests of the public. If any criticism of its work (in this regard) can be drawn from the cases, the Court (it would seem) believed that the Commission had been over-zealous.

4. All through its history the Commission has demonstrated the manifold advantages in its peculiar field of an administra-

monwealth, 103 Va. 512) was in no real sense a reversal; while another case (Southern Ry. Co. *v.* Commonwealth, 124 Va. 36) was substantially an affirmance and costs were allowed to the appellee.

tive tribunal over a court. This is particularly true as to its general methods and its flexible organization. With the handicap of the cumbersome and inelastic machinery involved in the jury system, its work would have been impracticable if not impossible.[237]

5. While the Commission in its procedure seems to have been willing to go far beyond the requirements of due process of law in order to secure a fair hearing to all parties, it has yet never been ultra-technical. On the other hand, it has continually subordinated procedure as a mere means to the broader ends to be achieved. Litigants have seldom sought and (thanks to the Court) even less seldom obtained reversals on technical errors of procedure.

6. The Commission has built up a considerable body of so-called administrative Law, which should both lighten and render more effective the labors of future Commissioners. This, though, has been done without any undue or violent breaking away from the traditional standards of the law. An encouraging sign of this is found in the fact that only four cases involving action by the Commission seem to have found their way to the United States Supreme Court, resulting in no single instance in a reversal of the Commission.[238]

7. In the eyes of the Court, the Commission has done its difficult task well. This is shown by the comparatively small number of reversals;[239] by the seemingly spontaneous compliments

[237] The author cordially subscribes to the views expressed by Prof. Sutherland in his article *The Inefficiency of the Jury*, 13 Michigan Law Rev. 302. Other admirable articles in cognate fields are (Thayer) *Judicial Administration*, 63 Pa. Law Rev. 585 and (Scott) *Trial by Jury and the Reform of Civil Procedure*, 31 Harvard Law Rev. 669. One of the most remarkable phenomena in modern American law is the sacro-sanctity attributed to this fundamental Anglo-Saxon institution (essentially Norman in its origin) which is still worshiped with reverent devotion and profound ignorance.

[238] Old Dominion Steamship Co. *v.* Commonwealth, 198 U. S. 299; Prentis *v.* Atlantic Coast Line Ry. Co., 211 U. S. 210; Dalton Adding Machine Co. *v.* Commonwealth, 236 U. S. 699, 246 U. S. 498; General Railway Signal Co. *v.* Commonwealth, 236 U. S. 500.

[239] To form a fair estimate of the Commission's work, the number of reversals should be compared not only with the number of cases affirmed but also with the very large number of cases decided by the Commission in which no appeal was taken.

paid the Commission in the Court's opinions; by the Court's emphatic and positive approval of many Commission findings which might well have been negatively affirmed under the provision of *prima facie* validity; by adoption (a rare appellate practice) in many cases of the opinion of the Commission; and by the general attitude of the Court toward the Commission.

8. Many modern procedural reforms have been urged in order that appellate Courts may try not the record but the case. It should be a matter of sincere rejoicing that the Court has so seldom felt called on to criticise the Commission for errors in connection with either perfecting the appeal or preparing the record for appeal.[240]

9. Extremely wide powers as to appeals from the Commission are given to the Court by the Constitution. The Legislature (under constitutional warrant) has extended those powers while the Court has liberally construed both the constitutional and legislative grants. No other State Court except the Supreme Court of Appeals can interfere with the operations of the Commission. This unifying of appellate responsibility in the highest court of the State has made no less for clean cut unity than for exceptional efficiency. These powers given to the Court are equally as broad with reference to when an appeal can be taken [241] as they are in connection with the ability of the Court

[240] This makes it all the more regrettable that these defects have characterized the last three cases decided by the Court, all of which were reversed. In Jones *v.* Rhea (Va.), 107 S. E. 814, the Court issued a writ of mandamus ordering the Commission to furnish a transcript of the record to parties held entitled to appeal, who did both appeal and prevail. While in the as yet unreported cases of Appalachian Power Co. *v.* Commonwealth (decided January 19, 1922) and Petersburg Gas Co. *v.* City of Petersburg (decided February 2, 1922), the Court felt called on to criticise the Commission (in important rate-regulation cases) for failing to send up such a record as the Constitutional mandate requires and for findings that (in the light of the record) seemed to be quite arbitrary.

[241] Thus, the appellant need not be a formal party of record to the proceeding before the Commission, there is no minimum pecuniary amount that must be involved, and the order from which an appeal is sought need not be final. See Jones *v.* Rhea (Va.), 107 S. E. 814. There can be an appeal even from ministerial action of the Commission. Jones *v.* Rhea, *supra;* Jeffries *v.* Commonwealth, 121 Va. 425.

on appeal effectively to dispose (without the necessity of further action by the Commission) of all the issues in the case.[242]

10. Quite apart from the merit or soundness of its decisions, the Court seems to have exercised its broad powers in a commendable spirit of refreshing modernity. Yet the statement is (with some hesitation) ventured that the content of the Court's opinions is superior to their form in that these opinions were apparently written rather from too local a view-point than in the gladsome light of the best modern thought on the problems involved. Quite probably the blame for this (if the criticism be just) should fall more heavily upon counsel than upon the Court.

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[242] This is convincingly shown by the decisions of the United States Supreme Court in Prentis *v.* Atlantic Coast Line Ry. Co., 211 U. S. 210, and Bacon *v.* Rutland Ry. Co., 232 U. S. 137. The seeming conflict between these two cases finds a ready explanation when the narrower powers of the Vermont Court are contrasted with the much broader powers vested in the Supreme Court of Appeals of Virginia.

But see Note 25, in which the express prohibition in the Virginia Constitution against the taking of new evidence by the Court on appeal from the Commission is criticised.